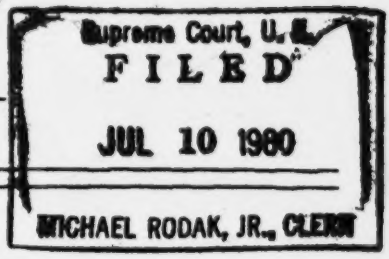
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-37



ROY JOHN LESTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

ROY JOHN LESTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

Application of Exclusionary Rule to Interstate Law Enforcement

1. Whether a state court should apply the exclusionary rule to contraband seized pursuant to a search warrant where the warrant was the direct, non-attentuated product of a constitutionally unlawful detention by out-of-state police.

Use of Trained Sniffing Dog as Fourth Amendment Search

2. Whether the use by police of a trained

dog to sniff personal luggage for the presence of contraband is a search or seizure within the purview of the Fourth Amendment of the United States Constitution, and, if so, what degree of preknowledge by police is a constitutional prerequisite thereto.

Warrantless Seizure to Permit Exposure to Trained Sniffing Dog

3. Whether police may make a warrantless seizure of personal luggage to permit a trained dog to sniff for the presence of contraband absent probable cause and exigent circumstances.

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REFERENCE TO OPINION BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division One, which was certified for publication, appears as People v. Lester, 101 Cal. App. 3d 613 (1980).

JURISDICTIONAL GROUNDS

The Court of Appeal of the State of California entered its judgment on January 30, 1980. A copy of the opinion is attached and marked as Appendix "A". Petitioner's petition for hearing in the Supreme Court of the State of California was denied on April 10, 1980.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Agent Alexander, a Drug Enforcement Investigator for the United States Department of Justice assigned to the San Diego County Narcotics Task Force, testified that on May 19, 1979, at approximately 4:30 p.m., he received a phone call from Officer Gann of the Houston Police Department, airport detail. Gann told Alexander to contact a Detective Burke of Florida's Broward County Sheriffs Airport Detail Narcotics Division regarding possible narcotics traffic coming to San Diego.

Alexander called Burke who related that he had "contacted" one Jim Gerardi and petitioner, Roy John Lester, in the Fort Lauderdale Airport. Burke told Alexander that petitioner's appearance drew his attention in that petitioner had a full beard, was extremely tall, casually attired with tennis shoes and was carrying a shoulder bag and checking a large suitcase. Burke related that petitioner had paid cash for a

one-way ticket and had looked around in all directions frequently, unlike other passengers.

Burke told Alexander that he "field interrogated" petitioner and Gerardi "for a few minutes" asking for production of identification and petitioner's destination and duration of stay in Florida. Petitioner provided identification and told Burke his destination (San Diego, with a stopover in Houston) and his duration of stay in Florida. Burke told petitioner that he was a narcotics officer conducting an investigation and petitioner reportedly asked "was he looking for cocaine."

Burke told Alexander that he had searched petitioner's handbag during the "contact" without result. Petitioner testified that he did not consent to the search of the handbag. Burke further related to Alexander that petitioner had refused to permit a search of his suitcase and that petitioner had told Burke that he would need a search warrant. Alexander admitted considering petitioner's refusal to consent

to a search to be significant and indicated same in his notes by putting stars next to the notation: "Refused look-see. More investigation. Said need warrant."

Petitioner testified further regarding the "contact" by Florida's officers and his testimony was uncontroverted. Petitioner testified that Burke had asked petitioner for identification, which he produced; that Burke took petitioner's ticket folder and asked petitioner to identify his checked suitcase, which he did; that after Burke continually asked for consent to search petitioner's suitcase and petitioner refused, Burke took petitioner to a little office where another agent was present and they continued to seek permission to search petitioner's suitcase and handbag; that despite petitioner's refusal, the agents searched his handbag without result; that after petitioner was in the room for ten to fifteen minutes Burke told him that a dog would be put on the suitcase at the Houston stopover or San Diego destination

and that petitioner should not try to switch planes because they would "get" him, whereafter petitioner was escorted onto the airplane.

Burke informed Alexander of petitioner's flight time, airline flight number, description of petitioner's suitcase, the name thereon (C. Kosh), that the suitcase was marked damaged and petitioner's physical description.

Alexander then obtained Agent Denmick, handler of the trained dog, Duster, from U.S. Customs and established a surveillance team at the San Diego airport. When petitioner's flight arrived and immediately after airline employees offloaded the luggage, Alexander identified petitioner's suitcase and removed it from the running conveyor belt leading to the public baggage area while other agents surveilled petitioner. Alexander placed petitioner's suitcase in a group of nearby luggage. Duster was released and "alerted" on petitioner's suitcase by biting, gnawing and and scratching it. Alexander then placed the suitcase amongst another group of bags

and Duster again "alerted", leading Agent Denmick to conclude to Alexander that petitioner's suitcase contained a controlled substance.

Alexander replaced petitioner's suitcase on the running conveyor belt approximately three or four minutes after its removal. When petitioner picked up his suitcase he was asked by a narcotics agent to accompany him to the Harbor Police office. Petitioner complied, appeared nervous and urinated in his trousers. Petitioner was detained until approximately 10:07 p.m. when Alexander obtained a telephonic search warrant whereby the contraband, ten pounds of hashish, was discovered.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEAL ERRONEOUSLY FAILED TO REVIEW THE ROLE OF THE CONSTITUTIONALLY UNLAWFUL DETENTION OF PETITIONER BY FLORIDA POLICE IN THE PROCUREMENT OF THE SEARCH WARRANT BY CALIFORNIA OFFICERS.

The published opinion of the California Court of Appeal blatantly ignores the role of the unlawful detention of petitioner by Florida police as clearly reflected in the record in the procurement of the search warrant by California officers. The opinion only recites that Agent Alexander "received a tip from the Fort Lauderdale Sheriffs office", even though petitioner's detention by Florida police is clearly and indisputably established by California's Agent Alexander's own testimony at petitioner's preliminary hearing. Petitioner had argued and again urges that the record clearly indicates that, as a matter of law, the search warrant was the direct, non-attenuated product of a constitu-

tionally unlawful detention by Florida police.

The United States Supreme Court has never specifically enunciated that a state court must scrutinize the constitutionality of an original contact by out-of-state police resulting in an in-state search or seizure. Certainly the policies behind the exclusionary rule of deterring investigative stops or detentions by police predicated on mere curiosity or hunch (Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868 (1968)) and protecting an individual's reasonable expectation of privacy from arbitrary invasions in the unfettered discretion of officers in the field (Brown v. Texas, 442 U.S. ; 99 S.C. 2637 (1979)) dictates such scrutiny.

This Court has resolved analogous issues raised by pre-1960 law wherein state searches were not considered subject to Fourth Amendment priniciples. After this Court ruled in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914), that evidence seized

by federal officers in violation of the Fourth Amendment was not admissible in a federal criminal prosecution, the practical difficulties of permitting evidence gained by searches by state officers in violation of Fourth Amendment rights to be handed over "on a silver platter" to federal agents became apparent. The "participation doctrine" (e.g., Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927); Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372 (1949)) ultimately evolved to encompass any participation by federal agents in state searches or by state officers acting on behalf of the United States until finally the Fourth Amendment was fully extended, through the Fourteenth Amendment, to searches and seizures by state officers in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949), and the ultimate rejection of the "silver platter doctrine" in Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960).

Uniformity of result for inter-state law enforcement transactions vis-a-vis intrastate

transactions dictates that this Court affirm the necessity of piercing the out-of-state police "tip" in this case to its roots: the unlawful detention of petitioner by Florida police. The United States Constitution requires rigorous scrutiny by state courts of out-of-state police participation so that out-of-state officers may not "clean their dirty laundry" across state lines.

The unlawful detention of petitioner by the Florida officers is clear on the record. When the Florida police detained petitioner for the purpose of identifying him, and further interrogated him and searched his shoulder bag, the Florida police performed a seizure of petitioner's person subject to Fourth Amendment requirements (Brown v. Texas, supra).

Further, the detention was clearly made without even the minimal prerequisite of an objectively reasonable suspicion that petitioner was involved in some criminal activity (Terry v. Ohio, supra). Logic compels that neither facial hair, height, casual

attire, nor possession of a shoulder bag and large suitcase by a person traveling in an airport in any way suggests involvement in criminality. Similarly, payment for a $116.00 one-way flight in cash provides no inference of criminality. So, too, have courts uniformly rejected the notion that looking around or other signs of nervousness (e.g., United States v. Westerbann-Martinez, 435 F.Supp. 690 (1977); United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977); Remers v. Superior Court, 2 Cal. 3d 659, 664 (1970)) imparts any implication of criminality since to do so would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons.

This Court very recently addressed such Fourth Amendment parameters in the case of United States v. Mendenhall, ____ U.S. ____ (May 27, 1980), finding there that although officers in fact may have had no probable cause to search nor reasonable suspicion to detain the defendant, she had not been detained nor

"seized" by agents since a reasonable person, in full view of all circumstances would have believed that she was free to leave. Applying the very criterion of United States v. Mendenhall to the factual differences in the instant case must lead to the conclusion that petitioner was unlawfully detained.

In Mendenhall the defendant was approached by DEA agents in the airport because she arrived from a major drug source city, was the last person off her plane, appeared very nervous and looked around, proceeded past the baggage area without claiming luggage, and changed airlines for her flight out. DEA agents approached Mendenhall, took her license and her ticket, which bore a different name, questioned her, and after returning her license and ticket, asked if she would accompany them to the airport DEA office for questioning, which she did without objection. At the DEA office, Mendenhall was asked for, and gave, consent to search her person, resulting in the discovery of the contraband.

Mr. Justice Stewart's lead majority opinion in Mendenhall concludes that even if the circumstances known to the officers at the time of their "contact" with Mendenhall did not amount to a reasonable suspicion or probable cause, there was no need therefor since Mendenhall's search was the product of voluntary consent and not the product of an unconstitutional detention since a reasonable person under the circumstances would have felt free to leave. This Court found that Mendenhall's consent to talk to officers, accompany them to the DEA office, and permit a search of her person was voluntary and in the spirit of apparent cooperation.

The record in the instant case shows that petitioner could not objectively feel reasonably free to leave or that he voluntarily consented to a search or detention in the spirit of cooperation. Unlike the record in Mendenhall, there is no indication here that Burke returned petitioner's identification or ticket prior to putting him on the flight.

In the instant case, Agent Burke admitted being refused search consent and being told that he would need a warrant. Agent Burke admitted searching petitioner's handbag without result. Petitioner was badgered to consent to a search, threatened to not try to switch planes, and escorted to his flight. It is indisputable that petitioner's interaction with Florida agents cannot be characterized as voluntary nor in the spirit of apparent cooperation, and was clearly a detention.

The four dissenting Justices in Mendenhall, White, Brennan, Marshall, and Stevens, significantly joined to protest that the "contact" by DEA agents therein was indeed a detention not founded on reasonable suspicion. Since the intrusion in Mendenhall was less than the instant case, and the preknowledge greater, petitioner is confident that these Honorable Justices would again concur that the intrusions by Florida officers were unconstitutional.

It is well-established that evidence which would not have been obtained "but for" an illegal invasion must be excluded as

"fruit of the poisonous tree" unless there has been no exploitation of the illegality by police or the connection between such evidence and the primary illegality has become so attentuated as to dissipate the taint. (Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407 (1963)). It is clear that the California officers were catalyzed by the Florida intrusion and information received therefrom, in particular, petitioner's search consent refusal. The suitcase which was the object of the Florida officer's "investigation" and requests for petitioner's search consent was thereafter seized from the conveyor belt by the California officer as soon as it arrived in California. There was no possibility for nor actuality of attenuation or dissipation.

The unlawful detention in Florida was blatantly ignored by the California Court of Appeal. This Court should deflate the dangerous myth of the out-of-state police "tip" and affirm and encourage transactional analysis of interstate law enforcement activity.

II.

THE UNITED STATES SUPREME COURT SHOULD DECLARE AND ESTABLISH WHETHER USE OF A TRAINED DOG TO SNIFF PERSONAL LUGGAGE FOR THE PRESENCE OF CONTRABAND IS A FOURTH AMENDMENT SEARCH OR SEIZURE AND, IF SO, WHAT DEGREE OF PREKNOWLEDGE BY POLICE OFFICERS IS A CONSTITUTIONAL PREREQUISITE THERETO.

The current status of the law across the nation in regard to the constitutional ramifications of the use of a trained dog by law enforcement to sniff for contraband can be classified as inconsistent and ambiguous. The Supreme Court of the United States should establish whether or not such conduct indeed falls within Fourth Amendment parameters to provide certainty and uniformity to judicial decisions across the nation. California and federal decisions typify the national ambiguity and inconsistency in this area of criminal procedural law.

There are now four (4) published California appellate cases dealing with use of trained contraband-sniffing dogs. In People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973),

the Court held that a trained dog's alert on a suitcase was sufficient corroboration of a reliable informant's tip to provide probable cause for a search. The Court left unaddressed the issue of what cause or preknowledge, if any, was required to justify use of a sniffing dog. In People v. Williams, 51 Cal. App. 3d 364, 324 Cal. Rptr. 32 (1974), the Court seemingly indicated that Fourth Amendment principles were indeed applicable, disapproving a general exploratory search with a sniffing dog in an airline baggage room citing "no probable cause" and denouncing the "search" as "illegal, a gross departure from constitutional principles." In People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 313 (1977), inexplicably ignored in the Court of Appeal's opinion in the instant case, the Court stated that "such a search with canines conducted without some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location is a constitutionally impermissible invasion of the suspect's reason-

able expectations of privacy and consequently a violation of the Fourth Amendment." The opinion by the Court of Appeal in the instant case represents a regression to the simple, uncontested principle of Furman: That a trained dog's reaction may bolster probable cause. The Court of Appeal has abdicated the responsibility of addressing the crucial issue raised herein and thereby further obstructed resolution of that issue: What amount of preknowledge, reasonable suspicion or probable cause, is a constitutional prerequisite to use of a trained contraband-sniffing dog on personal luggage?

The federal cases too have been characterized by ambiguity and non-uniformity. In United States v. Solis, 536 F.2d 880 (9th Cir. 1976), the Court cited "founded suspicion" as Fourth Amendment justification for use of trained sniffing dogs. In United States v. Venema, 563 F.2d 1003 (9th Cir. 1977), the Court cited no "reasonable expectation of privacy" in a rented footlocker in a storage area commonly made accessible to police. In

United States v. Bronstein, 521 F.2d 459 (2nd Cir. 1975), the Court cited "ample cause" to justify a canine sniff-search. Another federal court has gone so far as to dismiss as "frivolous" the contention that a dog's sniffing of the air around a footlocker constituted an unconstitutional intrusion. United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974).

Petitioner is beneficially interested in advocating the constitutional ramifications of the use of the trained contraband-sniffing dog since the exposure of his suitcase to the dog was not predicated on a legitimate, reasonable suspicion, much less probable cause, as discussed supra, but rather clearly on the mere hunch of the California officers based on petitioner's refusal to consent to a search in Florida.

III.

CALIFORNIA OFFICERS' WARRANTLESS SEIZURE OF PETITIONER'S SUITCASE TO PERMIT ITS EXPOSURE TO A TRAINED CONTRABAND-SNIFFING DOG WAS UNCONSTITUTIONAL SINCE PERFORMED WITHOUT PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

The record is clear that at the time California's Agent Alexander removed petitioner's suitcase from the running conveyor belt, leading to the public baggage area, immediately after it was unloaded from the plane, there was no probable cause to arrest petitioner nor search or seize his suitcase, as discussed supra. Agent Alexander admitted on the stand that he had no probable cause at that time. Rather, this further intrusion of petitioner was prompted by his search-consent refusal in Florida.

The Court of Appeal's opinion claims that the intrusion was "insignificant" since the time of the suitcase's removal from to replacement on the running conveyor belt was "only" about three minutes. Petitioner disagrees. This further intrusion on petitioner, resulting in his further detention, was

wholly unjustified and performed without constitutionally prerequisite preknowledge. An unconstitutional warrantless seizure is not "insignificant" merely because it is speedily performed. Indeed, the most thorough of searches and seizures may in some cases be performed in less than three minutes.

Petitioner's suitcase was indisputably seized, in that it was forcibly dispossessed from petitioner as distinguished from its voluntary surrender. The California officers were well aware of petitioner's refusal to a search or seizure of his suitcase in Florida.

To justify a warrantless search or seizure not incident to lawful arrest, the prosecution must show not only that probable cause existed to believe the item to be searched or seized contained contraband or other fruits or evidence of crime, but also that an emergency or exceptional exigent circumstance existed precluding the practicality of obtaining the required warrant (e.g., see Coolidge v. New Hampshire, 403 U.S. 443, 453-454 (1971)).

In the instant case, there were no exigent circumstances to justify a warrantless search or seizure of petitioner's suitcase. From the time Alexander first talked with Florida police immediately following his 4:30 p.m. call from Officer Gann from Houston, the suitcase was in the exclusive control of National Airlines. Therefore, the potential danger of "imminent destruction, removal, or concealment of the property to be seized" (Coolidge v. New Hampshire, Id.) required to justify the warrantless seizure was non-existent. San Diego officers had approximately four and one-half (4-1/2) hours to obtain a warrant to seize petitioner's luggage, but did not; that amount of time would apparently have been more than sufficient since the warrant eventually obtained from the magistrate, after the dog sniffed, was obtained within one hour of the dog's activities.

This Court has been consistently and persistently fervent in its reaffirmation of the principle that the expectation of privacy in the contents of closed luggage and

containers deserves the utmost constitutional protection and strict judicial enforcement of the warrant requirement (e.g., United States v. Chadwick, 433 U.S. 1 (1977)).

The warrantless seizure of petitioner's suitcase by California officers to permit the "hide-and-seek" contraband-sniffing procedure by the trained dog, Duster, was unlawful since made without probable cause and exigent circumstances. The subsequent search pursuant to the magistrate's warrant was the direct product of the unlawful seizure, and the contraband discovered thereby should have been suppressed as "fruit of the poisonous tree" on this third separate and independent ground.

CONCLUSION

For the foregoing reasons, petitioner, Roy John Lester, respectfully requests that a writ of certiorari issue to review the denial of petition for hearing to the Supreme Court of California entered on April 10, 1980.

Dated: July 7, 1980.

Respectfully submitted,

MICHAEL J. McCABE

MICHAEL J. McCABE
SAVITZ & McCABE

/s/

MARTIN LEE RAKLEY
BEESON and RAKLEY

PROOF OF SERVICE

I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 108 Ivy Street, San Diego, California.

On July 8, 1980, I deposited in the U.S. mail, at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR ROY JOHN LESTER, Petitioner, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of July, 1980, at San Diego, California.

MICHAEL J. McCABE

MICHAEL J. McCABE

Filed in the Court of Appeal
Fourth District
January 30, 1980

CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent v. ROY JOHN LESTER, Defendant and Appellant.	4 CRIM 11239 (Superior Court No. CR 43863)

APPEAL from a judgment of the Superior Court of San Diego County. Earl H. Maas, Jr., Judge. Affirmed.

Savitz & McCabe and Michael J. McCabe and Beeson and Rakley and Martin Lee Rakley for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, Jay M. Bloom and Alan S. Meth, Deputies Attorney General for Plaintiff and Respondent.

APPENDIX "A"

DUSTER'S DETECTION

Roy Lester appeals the judgment after he pleaded guilty to possessing marijuana for sale (Health & Saf. Code, § 11359) following the denial of his motion to suppress evidence (Pen. Code, § 1538.5). He received probation upon conditions, among them confinement to the sheriff's custody for 120 days and 500 hours of volunteer work in San Diego. These conditions were stayed pending appeal.

Lester, a law student in San Diego, went to Florida for a couple of days and returned with more than ten pounds of hashish. He got caught under circumstances where Duster the dog played no small part. Lester's Fourth Amendment rights remained intact.

Alexander, a U.S. Department of Justice official in San Diego, received a tip from the Ft. Lauderdale sheriff's office that Lester was suspected of carrying narcotics in his luggage on his flight to San Diego. A thorough description of Lester and his luggage was given. Alexander obtained the services of Duster and his handler from the U.S. Customs.

When Lester's flight arrived, his bag was placed on the conveyer belt for transportation to the public baggage area. Alexander, who with other agents had the right to be in the area, removed the bag and placed it in a group of nearby bags. Duster, an expert in narcotics detection, was released and strongly alerted on Lester's bag, biting, gnawing, and scratching it. The bag was hid from Duster in another group of bags close by. Again Duster alerted to it quickly. Alexander replaced the bag on the conveyer belt; the time from removal to replacement was insignificant, about three minutes. When Lester picked up the bag, an official asked him to accompany him to the harbor police office. Lester agreed. He was very nervous and urinated in his pants. When Lester refused permission to look in his bag, a search warrant was obtained and the contraband was revealed.

Without the need to cite other cases,[1/]

FOOTNOTE 1: E.g., Link's Link with Destiny, A Short Tale, (People v. Furman (1973) 30 Cal.App.3d 454; Bourbon's Nose Knows, or the case of Bourbon's Bust, People v. Williams (1975) 51 Cal.App. 3d 346.

these facts speak for themselves and clearly show probable cause for the conduct of the officials. In truth they reflect the restraint which is wisely applauded by the judiciary as being paradigm conduct. Rather than precipitously taking action without probable cause, the officials carefully investigated without interfering with Lester's rights, and at the proper moment, after developing a thorough case, arrested Lester.

Lester received exemplary legal representation, typical of the high standards of his trial attorney Robert Baxley.

Judgment affirmed.

CERTIFIED FOR PUBLICATION

/s/ Brown
P.J.

WE CONCUR

/s/ Cologne
J.

/s/ Staniforth
J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

April 10, 1980

I have this day filed Order

HEARING DENIED

In re 4 Crim No. 11239

People

vs.

Lester.

Respectfully,

G.E. BISHEL
Clerk

Supreme Court, U.S.
FILED
SEP 26 1980
MICHAEL RODAK, JR., CLERK

No. 80-37

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

ROY JOHN LESTER,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THERE WAS A DETENTION BY A FLORIDA LAW ENFORCEMENT OFFICER AND, IF THERE WAS A DETENTION, WHETHER THE DETENTION HAD ANY AFFECT ON THE DECISION OF CALIFORNIA LAW ENFORCEMENT TO USE A DOG TO AID IN A FURTHER INVESTIGATION.

2. WHETHER USE OF A DOG TO AID IN DETECTING NARCOTICS VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHTS.

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NO. 80-37

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

ROY JOHN LESTER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOR THE FOURTH APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The California Court of Appeal, Fourth Appellate District, Division One, received petitioner's direct appeal from a judgment of conviction. In a published opinion, the court found no merit to petitioner's contentions and affirmed the

judgment. The opinion appears at 101 Cal.App.3d 613 (1980).

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. 1257, subdivision 3.

STATUTES INVOLVED

The applicable statutes involved are set forth in Appendix A.

STATEMENT OF THE CASE

An information charged petitioner with transportation of marijuana (Health & Saf. Code, § 11360) in count I and possession of marijuana for sale (Health & Saf. Code, § 11359) as to count II. (CT 1.)

Petitioner's motions to suppress evidence and to dismiss the information (Pen. Code, §§ 995, 1538.5) were heard and denied and he entered a guilty plea as to count II. (CT 70-82.)

He was granted probation on the condition he serve 120 days in the county jail. Service of the jail sentence was stayed pending an appeal. (CT 72-74.)

In a published opinion issued on January 30, 1980, in People v. Lester (1980) 101 Cal.App.3d 613 (4 Crim. 11239), the Court of Appeal, Fourth Appellate District, Division One, affirmed the conviction. (Petitioner's Appen. A.)

The California Supreme Court denied a hearing in the matter on April 10, 1980. (Petitioner's Appen. A.)

STATEMENT OF FACTS

A. Search Warrant

A telephonic search warrant was issued by Judge Henderson at 10:08 p.m. on May 19, 1978, based upon the affidavit of Officer Al Alexander of the Narcotics Task Force. The warrant authorized the search

of a suitcase for controlled substances. After he was sworn, Officer Alexander stated the following:

Officer Alexander had a telephone conversation with Deputy Burke of the Broward County Sheriff's Department in Fort Lauderdale, Florida that afternoon. Deputy Burke's attention had been drawn to petitioner in the Fort Lauderdale airport because petitioner and his associate were paying cash for a one-way ticket to San Diego, and they appeared very nervous when contacted by Burke. Petitioner said he had been in Florida for two days. Burke said he was conducting a narcotics investigation and requested permission to look through petitioner's luggage which was denied.

Officer Alexander then contacted the United States Customs dog handler and a dog, Duster, was sent to the airport. Duster had had extensive training and

experience. After the luggage Deputy Burke had described to Officer Alexander as belonging to petitioner had been off-loaded at the San Diego International Airport, Officer Alexander removed it from the baggage belt, placed it among numerous other bags, and when the dog passed it, he responded to the bag which indicated to the handler there was a narcotic inside. The procedure was repeated. The baggage was then returned to the belt and came out into the area where the passengers pick up their baggage. Petitioner claimed the bag and, as he began to walk away, he was stopped by the Narcotics Task Force. Petitioner became extremely nervous and urinated in his pants. Officer Alexander informed petitioner he was obtaining a search warrant. At the time the search

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warrant was obtained, petitioner was at the airport with his baggage. (CT 34-44.)[1/]

B. Preliminary Examination and Motion to Suppress Hearing

On May 19, 1978, at about 4:30 p.m., Officer Alexander received a telephone call from Officer Gann of the Houston Police Department who gave Alexander the telephone number of a Detective Burke of the Fort Lauderdale, Florida, airport detail narcotics division. (PT 45.) Gann told Alexander only that he had been contacted by Burke, that Burke said a Mr. Lester was flying to San Diego via Houston, and the Houston police did not intend to investigate the matter. (PT 69-71.)

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1. CT refers to the clerk's transcript. It was stipulated at the motion to suppress hearing the transcript of the preliminary hearing would be admitted into evidence. (RT 2.) For purposes of this response, PT designates the reporter's transcript of the preliminary examination. RT refers to the reporter's transcript of the 1538.5 hearing.

Alexander called Burke and Burke related certain observations. He saw two men at the National Airlines counter at the Fort Lauderdale airport. One, Lester, was extremely tall, had a full beard, wore casual clothes, described as a dark blue sweater jacket, a white shirt, blue pants, and blue-striped white tennis shoes. He carried a shoulder bag, and checked in a large suitcase, which Burke described as a large brown Tourister suitcase, with a tag bearing the name C. Kosh and it was damaged. Burke also saw Lester pay cash for his ticket. Burke noticed both men were frequently looking around in all directions, unlike other passengers. When Burke contacted the men, they appeared to be very nervous. (PT 46-49, 53, 78-79.)

Burke further related he stopped the two men, obtained their identifications and questioned them about their destination.

Burke told them he was narcotics officer conducting an investigation. Lester asked him if he was looking for cocaine. Burke searched Lester's shoulder bag because he was about to enter a secure boarding area. Burke asked Lester for permission to search the suitcase, but Lester refused. (PT 46-47, 74, 85, 90.)

Burke watched Lester board the plane for San Diego and gave Alexander the flight number and scheduled arrival time in San Diego which was 8:25 p.m. (PT 49.) Alexander went to the San Diego airport and contacted a National Airlines representative, Mr. Moore, at the ticket counter. Moore advised him the flight would be late and, as far as he knew, no one had left that flight in Houston. Alexander told Moore he intended to remove Lester's bag from its course of travel and attempt to obtain

a search warrant for it. Moore shook his head in the affirmative.

Alexander arranged for the assistance of other Narcotics Task Force officers and a dog, which was specifically trained to detect controlled substances.

The flight arrived at about 8:45 p.m. and the baggage was off-loaded about 9:00 or 9:05 p.m. It was brought to a nonpublic baggage area which was shared by all the airlines. The Unified Port District has retained control over that area and has granted narcotics agents permission to enter that area. (PT 14, 49-53; RT 4-6.)

Alexander saw the suitcase in question, removed it from the conveyor belt, and placed it with other luggage in the area. The dog handler, Mr. Demmick, had the dog make two passes at the luggage. Both times the dog indicated a controlled substance was contained in Mr. Lester's suitcase.

Alexander told Agent Perkins about the dog's response to the bag and instructed him to tell the other agents to detain whoever claimed the suitcase in the public area. Alexander then placed the suitcase on the conveyor belt. The entire procedure took between two and four minutes. (PT 53-55; RT 18.)

Agent Cooper saw Lester in the public baggage claim area and recognized him from the description he had been given. Cooper saw Lester pick up the suspect suitcase. Cooper identified himself to Lester and asked him if he would mind accompanying Cooper to the Harbor Police Office. Lester agreed. He appeared very nervous and urinated in his trousers. Cooper took the bag from him and they went to the office. (PT 55, 106-108, 121, 124.)

In the office, Alexander told Lester he was being detained and asked for

consent to search the suitcase which Lester refused. The search warrant was then obtained, and a search resulted in the discovery of about ten pounds of hashish. (PT 57-63, 101-102.)

ARGUMENT

I

THE SEARCH OF PETITIONER'S SUITCASE PURSUANT TO THE SEARCH WARRANT WAS WHOLLY INDEPENDENT OF ANY CONDUCT WHICH MAY HAVE OCCURRED IN FLORIDA

Petitioner first contends the hashish found in his suitcase pursuant to the search warrant should have been suppressed because he was unlawfully detained in Florida, and the search and seizure in San Diego was a direct result of that illegality. The magistrate at the preliminary examination found no detention occurred in Florida. (PT 27; see also PT 190-191, 202.) The court at the motion

to suppress found no unlawful detention, and, even if there were one, ". . . it really had nothing to do with the action of the San Diego officers." (RT 31.) A review of the record indicates any possible detention in Florida did not affect the actions of the San Diego officers.

Officer Alexander stated in his affidavit in support of a search warrant and testified at the preliminary examination that Deputy Burke's attention was drawn to petitioner at the Fort Lauderdale airport because of his attire, his act of looking around in all directions frequently unlike other passengers, and his payment for the ticket in cash.[2/] To Officer Alexander, a trained narcotics officer, this information

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2. Also, of course, in plain sight was petitioner's physical appearance, and his shoulder bag and suitcase. Petitioner's name, flight and destination were readily available from the ticket clerk.

could have been unusual and therefore significant. (PT 47, 69-70; CT 37; see People v. Gale (1973) 9 Cal.3d 788, 795-796 ("'[e]xperienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult tasks of protecting the security and safety of law-abiding citizens. . . .'").)

Apparently, this was unusual to Deputy Burke because he decided to act upon his perceptions. For whatever reasons, he chose to directly contact petitioner. His suspicions were, however, not satisfied by the contact. Since petitioner was about to leave Fort Lauderdale and Deputy Burke had no other information to use to detain petitioner against his will, he had two choices -- he could have forgotten about the matter or he could forward his suspicions ahead to appellant's destination.

He properly chose the latter course, and, of course, his suspicions proved well founded.

Officer Alexander, upon receiving the information from Deputy Durke, also chose to act. He obtained the services of Duster. Duster detected the presence of a controlled substance, and, based upon Duster's reaction, a search warrant was obtained. It is therefore apparent no tangible evidence or information obtained after the contact between petitioner and Burke was used to establish probable cause for the search warrant. Thus, the only "fruit" from Burke's actions petitioner can point to was the "impetus" it gave to Alexander's actions in San Diego. Petitioner can only claim the catalyst for Alexander's actions was the information obtained by Burke's unlawful instrusion. (AOB 18-19.)

As we have shown, however, Deputy Burke's suspicions were aroused before he contacted petitioner, and those suspicions caused him to contact petitioner. When he was unable to satisfy his suspicions directly from petitioner, he had every right to continue his investigation in another manner. For example, Burke could have obtained petitioner's name from the airline agent and then run a records check, he could have asked other officers if they were familiar with petitioner, or he could have commenced a surveillace on petitioner. Based upon the results of these actions, further investigation may or may not have been tried. Probably because time did not permit, Burke instead forwarded his information to San Diego officers to do with as they wished. Thus, the impetus for the investigation occurred before Burke contacted petitioner, nothing was obtained from the

contact which was in any way used to support the later search, and the search warrant is fully supportable solely by information obtained after, and independent from, Deputy Burke's actions.

The effect of petitioner's argument is once an illegality occurs, the suspect is foreover insulated from further investigation. Such is not the law. The appropriate test is set forth in People v. Eastmon (1976) 61 Cal.App.3d 646, at page 653:

> "However, the 'but for' test alone is not sufficient to render inadmissible evidence that subsequently is obtained by the police in a legal manner; to render inadmissible evidence which possibly would not have been obtained by the police 'but for' some earlier police impropriety, there must be such a connection between the impropriety and the subsequent transaction so that it can be said, fairly, that the two transactions cannot be treated separately. In short, evidence is not rendered inadmissible against a defendant merely because there is a relationship

> between the evidence and some prior illegal police activity, if, for example, the evidence was obtained by the police as the result of an independent intervening act voluntarily committed by the defendant by means which are distinguishable from the initial illegality. (Citation.) As the court explained in Restani v. Superior Court (1970) 13 Cal.App.3d 189, 198: 'Under the Wong Sun test . . . evidence . . . is not excluded merely because it would not have been obtained but for the illegal police activity if the connection between such evidence and the illegal activity has become attenuated so as to dissipate the taint. [Citations.] Accordingly, if the prosecution can establish that the primary illegality was not a sine qua non or indispensable cause of the discovery of the physical evidence, but, that at worst it merely contributed to such discovery, the exclusionary rule does not apply. [Citations.]'"

Hence, the trial court's conclusion the actions of Deputy Bruke were independent from those of the San Diego officers is

a reasonable one and supported by substantial evidence.

Moreover, the trial court's conclusion the actions of Deputy Burke were independent from those of San Diego officers was reasonable in light of the fact the Florida contact was not the direct cause for the use of the dog in San Diego. Rather, the dog was used in San Diego because of the independent judgmental decision of the Florida officer to contact Houston police, the decision of Houston Police to contact San Diego officials, the call from San Diego officials to the Florida police, and, finally, the decision of the San Diego officials to use the dog. In light of all the independent intervening judgments made in this case before the dog was used, it cannot be said use of the dog in San Diego was affected by the Florida contact. Rather, the chain from the

Florida contact to the decision to use the dog in San Diego was so interrupted by independent judgments that the San Diego conduct could not be the fruit of any conduct by Florida officials. (Wong Sun v. United States (1963) 371 U.S. 471; United States v. Crews (March 25, 1980) ___ U.S. ___ [63 L.Ed.2d 537, 545].)

Furthermore, in light of the recent decision of this Court in United States v. Mendenhall (May 27, 1980) ___ U.S. ___ [64 L.Ed.2d 497], it is questionable if there even was a detention in this case in the Florida airport. In Mendenhall this Court noted every contact between the police and citizens is not necessarily a detention or arrest. Instead, there may be situations where the police merely interview or contact individuals. Under such circumstances there is no seizure within the meaning of the Fourth Amendment. Accordingly, this Court

observed a person is only seized within the meaning of the Fourth Amendment when, by means of physical force or a show of authority, his freedom is restrained.

In the instant case the record shows petitioner was not seized in any manner in Florida. He was merely contacted and casually questioned by the police officer and one bag was searched for airport security purposes. When a further search was refused by petitioner, he was not restrained in any way. Rather, the officer acceded to his wishes and did not conduct the search. Thereafter, petitioner was allowed to leave and board the airplane without any restriction.

Under these circumstances petitioner's freedom was not restrained in any way and he was thus not detained. Accordingly, there was no conceivable violation of his Fourth Amendment rights

in Florida. (See too People v. Michael (1955) 45 Cal.2d 751, 754.)

II

FEDERAL LAW HAS CONSISTENTLY HELD USE OF DOGS FOR DETECTING NARCOTICS AT THE AIRPORT DOES NOT DEPRIVE AN INDIVIDUAL OF ANY FOURTH AMENDMENT RIGHTS

Petitioner's other two contentions are that use of dogs to detect narcotics at the airport is a violation of an individual's Fourth Amendment rights and that the federal cases are in hopeless disarray on the issue. Neither contention has any merit and there is thus no basis for granting petitioner's request for review here.

The first case to deal with the issue in the federal courts was United States v. Fulero (D.C.Cir. 1974) 498 F.2d 748. There a dog was used to sniff suitcases at a bus station. The Court of Appeal found use of a dog in such activities did not constitute an intrusion into an individual's right to

privacy. Since use of the dog was not deemed to be an unlawful intrusion, the court found no need to determine whether there was any standard required for permitting dogs to sniff luggage.

The next case discussing the issue was United States v. Bronstein (2d Cir. 1975) 521 F.2d 459. In this case a marijuana sniffing dog was used at an airport and detected marijuana in the defendant's luggage. The Court of Appeal concluded there was no reasonable expectation of privacy as to the outside of luggage at an airport and found use of the dog was not a search within the meaning of the Fourth Amendment.

While the court did note the police had ample cause for the use of the dog, the court did not impose any cause requirement for the use of the dog. Rather, it essentially held the use of the dog was

not an intrusion and, in passing, noted the police had cause for the investigation.

In United States v. Solis (9th Cir. 1976) 536 F.2d 880, the Court of Appeals again upheld the use of a marijuana sniffing dog. The court found use of the dog under the circumstances was not unreasonable and not a prohibited search under the Fourth Amendment. The court concluded use of a dog to aid in detecting the odor of marijuana was not a search and there was no invasion of any right to privacy as the dog was not intruding into any items. Rather, the dog was sniffing an odor emanating from the item into open air space.

Although the court did note there was a founded suspicion for the investigation, the court did not require there be a certain quantum of proof to use a dog.

Similarly, in United States v. Venema (10th Cir. 1977) 563 F.2d 1003, the

Court of Appeals held use of a marijuana sniffing dog to smell the odor of marijuana emanating from a closed item was not a search where the dog had a right to be where he was at.

Consequently, while petitioner has tried to establish that federal cases are in disarray on the subject of the use of dogs for narcotics detention, they have generally upheld use of dogs as an investigation tool on the ground use of the dog does not constitute a Fourth Amendment violation. The basic reasons for this conclusion are that (1) the sniffing of the dog is not a constitutional intrusion into a right of privacy; (2) the dog conducts its activity from a place where it and law enforcement officers have a right to be; (3) there is no right to privacy in an odor which emanates from luggage into the open air space where it can be detected by

the dog; and (4) the investigative process is reasonably circumscribed.

Although these cases have in passing mentioned various levels of information known to the police such as founded suspicion, ample cause, etc.; none of these cases imposed any standard of proof on police as a prerequisite to using dogs. Rather, these statements as to the level of information known to the officers seem designed to indicate the investigation in each case was not an exploratory one, but was a reasonably circumscribed investigation under the facts of that particular case.

Petitioner also points out that California cases dealing with the area are also in conflict with each other. However, the fact California state courts have not agreed exactly how to deal with dog sniffing cases does not present a substantial federal question warranting this Court grant

certiorari in this case. In any event, the three California cases really are consistent to the extent they suggest the investigation should not be exploratory, but geared toward some specific items or items of luggage. (See People v. Furman (1973) 30 Cal.App.3d 454; People v. Williams (1975) 51 Cal.App.3d 346; People v. Evans (1977) 65 Cal.App.3d 924.)

In any event, as there really is no conflict among the federal courts on the issue, there is no need to grant review in this case. Moreover, it should be noted the conduct of the officer and the dog in this case complied with existing federal authority concerning marijuana detecting dogs.

Here the dog was used from a place where the police and the dog had a right to be as Officer Alexander had been given a key to the area where the baggage was and it was an area used by many airlines in San Diego. Furthermore, the airport manager had

consented to Alexander's presence in the area. (RT 3-6; PT 14.) Petitioner also could not have any right to privacy as to an odor emanating from the luggage into the open air space which could be detected by the dog. In addition, the dog did not intrude in any way into the contents inside the luggage to which there might be an expectation of privacy.

The conduct of the officer here was also reasonable. It was based on reliable information for a Florida law enforcement officer, involved use of a previously tested and reliable dog (CT 37-38), and the bag was not unduly delayed or unreasonably manhandled.

As the investigation thus was narrowly circumscribed, occurred from a place where police had a right to be, did not intrude into any privacy interest of petitioner, and did not constitute any physical intrusion into the property of petitioner; use of the dog to sniff petitioner's luggage

was proper. (United States v. Solis, supra, 536 F.2d 880; United States v. Bronstein, supra, 521 F.2d 459; United States v. Fulero, supra, 498 F.2d 748; United States v. Venema, supra, 563 F.2d 1003.)

Nothing in United States v. Chadwick (1977) 433 U.S. 1, compels a contrary conclusion. That case dealt with the warrantless search of the contents of luggage. The instant case involves the examination of an odor emanating outside the piece of luggage and use of information obtained in this examination to eventually obtain a search warrant for the contents of the luggage.

Consequently, the use of the dog in this case to aid in the detection of marijuana was in accord with federal law on the subject and thus did not constitute a violation of petitioner's Fourth Amendment rights.

Petitioner's suggestion some requirement of probable cause should be

imposed on law enforcement before a dog may be used makes no sense. If police had probable cause to search, they could simply get a warrant. Moreover, use of a dog to aid in an investigation is akin to using binoculars or lights to aid in a plain sight search. (See United States v. Solis, supra, 536 F.2d 880.) As courts do not require any probable cause or reasonable cause to use these items, there is no reason to impose such a requirement for police to use a dog to aid in their investigation of items which may be detected through plain smell. This is especially true when, as noted earlier, the dog's use of its own sense of smell does not constitute an instrusion into any matter to which there is an expectation of privacy. (See United States v. Painter (W.D.Mo. 1979) 480 F.Supp. 282.) Rather, the dog is sensing odors which have emanated into open air

space. Furthermore, there is no reason to impose some reasonable or probable cause requirement when the police and the dog, as in plain sight searches, are merely standing in a place where they have a right to be at the time the dog is using its senses.

Rather, the only reasonable requirement is that the use of dogs not be a license for exploratory investigations. Since the cases have already set forth such a limitation, there is no reason to impose any high level of proof to permit an investigation. Thus, petitioner's complaint here is devoid of substance.

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CONCLUSION

For the foregoing reasons respondent requests the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General

ROBERT H. PHILIBOSIAN,
Chief Assistant Attorney General--Criminal Division

DANIEL J. KREMER,
Assistant Attorney General

RICHARD D. GARSKE,
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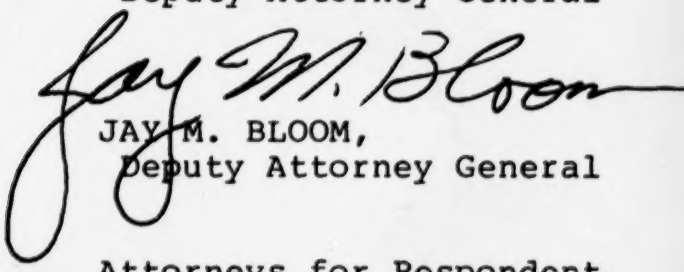

JAY M. BLOOM,
Deputy Attorney General

Attorneys for Respondent

APPENDIX A

CALIFORNIA STATUTES

Penal Code Sections

§ 995.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

§ 1538.5.

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure . . . .

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at

§ 1538.5, subdivision (i), continued a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

Health and Safety Code Sections

§ 11359.

Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison.

§ 11360.

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers,

§ 11360, subdivision (a), continued

or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian, Attorney General
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110 West A Street, Ste. 700
San Diego, CA 92101

No. 80-37

ROY JOHN LESTER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, Suite 700, San Diego, California, 92101.

I served the within BRIEF OF RESPONDENT IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT: an original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543 of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Martin Lee Rakley, Esq. (3 copies)
222 Ash Street
San Diego, CA 92101

Michael J. McCabe, Esq. (3 copies)
108 Ivy Street
San Diego, CA 92101

Robert L. Ford, Clerk
Court of Appeal
Fourth District, Div. One
1350 Front St., Rm. 6010
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J. L. Kavanagh
Chief Deputy Clerk
California Supreme Court
350 McAllister St., Rm. 4050
San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 25th day of September, 1980.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 25, 1980.

Clifford E. Reed, Jr.

Subscribed and sworn to before me this 25th day of September, 1980

Karen K. Lum

Notary Public in and for said County and State.

KAREN K. LUM
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 24, 1984